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Editor-in-Chief: Karl P. Sauvant (Karl.Sauvant@law.columbia.edu)

Editor: Ken Davies (Kenneth.Davies@law.columbia.edu)

Managing Editor: Alma Zadig (az2242@columbia.edu)

Environmental concerns in international investment agreements: The “new era” has commenced, but harmonization remains far off

by

Kathryn Gordon and Joachim Pohl*

In *Columbia FDI Perspective* No.37, Daniel M. Firger foretells “a new era characterized by profound harmonization” between climate change policy and international investment law, based on what he sees as “unmistakable signs of convergence” in recent investment treaty making.¹ A study just released by the OECD suggests that convergence of investment treaty making toward environmental policy began about a decade ago, but also that “profound harmonization” of investment and climate change policy is still some time away.²

Arguably the first of its kind, the study surveys over 1,600 international investment agreements (IIAs) for references to environmental concerns and categorizes these references according to their regulatory purpose. It provides a systematic statistical portrait of how and to what extent governments have dealt with environmental protection in their investment agreements since 1958.

Until relatively recently, references to environmental concerns in investment treaties were exceedingly rare. Indeed, no investment treaty concluded between 1958 and 1985 contained any reference to the environment, and fewer than 10% of treaties concluded in any given year from 1985 to 2001 contained this feature. References to environmental concerns in such treaties have increased sharply since 2002. The share of newly concluded IIAs with explicit environmental references exceeded 50% for the first time in 2005 and reached 89% in 2008. Notably, all free trade agreements (FTAs) included in the sample contain references to the environment in their investment chapters.

* Kathryn Gordon (kathryn.gordon@oecd.org) and Joachim Pohl (joachim.pohl@oecd.org) are officials in the Investment Division of the OECD. The authors wish to thank Daniel Firger, Howard Mann and Benjamin J. Richardson for their helpful comments on this *Perspective*. The views expressed in this article are those of the authors; they may not be shared by the OECD and by its members. **The views expressed by the individual authors of this *Perspective* do not necessarily reflect the opinions of Columbia University or its partners and supporters. *Columbia FDI Perspectives* (ISSN 2158-3579) is a peer-reviewed series.**

¹ Daniel M. Firger, “The coming harmonization of climate change policy and international investment law,” *Columbia FDI Perspectives*, No. 37, May 9, 2011, p 1.

² Kathryn Gordon and Joachim Pohl, “Environmental concerns in international investment agreements: A survey,” OECD Working Papers on International Investment, No. 2011/1, (2011) available at: <http://www.oecd.org/dataoecd/50/12/48083618.pdf>.

Treaty writing practice in this regard still varies considerably: 19 of the 49 countries covered by the study have never used such language in their IIAs, while a few countries have, from a given date onward, systematically included environmental references in their treaties (e.g. Canada, Mexico and the United States since the early 1990s, and Belgium/Luxembourg more recently). Several countries such as Australia and the Republic of Korea appear to have no policy of systematically including such language, but have included such references in some of their treaties.

The environmental language in IIAs shows significant variation across time and across countries. The details of the language, even within specific subject areas, vary and identical language across treaties is rare. However, almost all references to environmental concerns appear to develop a limited number of themes (e.g. general environmental references in preambles, right to regulate in the environmental policy area, and not lowering environmental standards for the purpose of attracting investment).

A few treaties in the sample go beyond generic references to environmental concerns and deal with more specific environmental subject matter. These more specific references mainly use language derived from the 1948 General Agreement on Tariffs and Trade, repeating the concepts underlying the environmental policy agenda that prevailed at that time. These references include 45 treaty clauses that deal with protection of human, animal or plant health and 25 dealing with protection of exhaustible natural resources. Almost without exception, more recent concerns, such as climate change and biodiversity, have not yet penetrated the limited set of environmental issues addressed in investment treaties.

The statistical analysis of treaty writing practice says little about the legal effects and policy implications of references to environmental concerns in IIAs. Whether such clauses enable governments better to integrate investor protection and environmental policy objectives is an open question. Given the large stock of IIAs in force, the political and practical limitations on renegotiations of IIAs, and the slow penetration of concepts of international environmental law into IIA negotiations, it would seem that changing or adding to the explicit environmental content of investment treaties will be a long, slow process.

Other avenues for clarifying states' political and legal intent in treaty writing appear promising, but require further reflection and dialogue by both the investment and environmental policy communities.³ This reflection could start by exploring systematic variations of clauses in the treaty sample – e.g. the fact that all FTAs with investment chapters in the sample, but only 6.5% of BITs, contain references to the environment. Further legal analysis could shed light on the influence of international environmental law on the interpretation of investment law and ultimately contribute to the “profound harmonization” between climate change policy and international investment law.

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³ OECD, “Harnessing freedom of investment for green growth, Freedom of Investment Roundtable 14 April 2011” (April 14, 2011), sets forth findings by participants in the OECD-hosted *Freedom of Investment* process on the role of international investment in supporting the realization of countries' green growth objectives.

For further information please contact: Vale Columbia Center on Sustainable International Investment, Ken Davies, Kenneth.Davies@law.columbia.edu.

The Vale Columbia Center on Sustainable International Investment (VCC), led by Dr. Karl P. Sauvant, is a joint center of Columbia Law School and The Earth Institute at Columbia University. It seeks to be a leader on issues related to foreign direct investment (FDI) in the global economy. VCC focuses on the analysis and teaching of the implications of FDI for public policy and international investment law.

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